

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

VIOLA FRISON,

Plaintiff,

vs.

WMC MORTGAGE CORPORATION,  
et al.,

Defendants.

CASE NO. 09cv1733-LAB (NLS)

**ORDER GRANTING MOTION TO  
EXPUNGE NOTICE OF *LIS  
PENDENS*; AND**

**ORDER DISMISSING  
COMPLAINT WITHOUT  
PREJUDICE**

[Docket numbers 5, 6, 8.]

This case concerns a threatened foreclosure on real property. Plaintiff seeks rescission of the deed of trust, an order forbidding foreclosure on the property, damages, costs, and attorney's fees. The complaint identifies claims under the Real Estate Settlement Practices Act (RESPA), 12 U.S.C. §§ 2605 *et seq.*, and the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 *et seq.*, as well as various state claims for violation of Cal. Bus. & Prof. Code § 17200, fraud, and negligent misrepresentation.<sup>1</sup> Besides unknown or "Doe" Defendants, the only two Defendants are WMC Mortgage Corporation and Saxon Mortgage Service, Inc.

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<sup>1</sup> The complaint also identifies rescission, determination of the validity of the lien, negligent misrepresentation, and quasi contract as causes of action, but these are not actually claims. The first three are remedies she seeks. Quasi contract is a theory by which Plaintiff seeks to hold Saxon liable for wrongdoing named in the other claims even if it is found to have no contract with Plaintiff.

1       On the same day the complaint was filed, Plaintiff filed a notice of *lis pendens*.  
2 Defendants then each filed motions to dismiss or for a more definite statement, and  
3 Defendant Saxon filed a motion to expunge the notice of *lis pendens*. Although the  
4 complaint originally contained a paragraph purporting to be a qualified written request  
5 (QWR) under RESPA, the Court ordered it stricken.

6 **I. The Complaint**

7       Plaintiff took out a refinancing loan on or about October 12, 2004, secured by real  
8 property in San Diego County. She alleges that all Defendants, along with an unidentified  
9 broker, made misrepresentations during the loan process, caused her to enter into a loan  
10 with different terms than she thought she was getting, and failed to provide her with required  
11 disclosures. The alleged misrepresentations concern the loan's interest rate, the amount  
12 of payments, the amount of equity in the property, and the available loan proceeds. Plaintiff  
13 alleges that, as a result, the loan became unaffordable. She argues the effect of all this was  
14 to put her into a loan without her "informed consent." She says she told WMC and Saxon  
15 she wanted to rescind the loan (Complaint, ¶ 25), but doesn't allege when she did this. She  
16 apparently clarifies her allegations about Defendants' roles later, when she says WMC was  
17 the original lender, and Saxon acquired the loan (or some unknown rights to the loan) from  
18 WMC later, but that Saxon is still liable for misrepresentations. (¶¶ 30–32.)

19       Plaintiff also made broad allegations of predatory lending practices. (¶ 23.) She  
20 apparently mentions these as a way of showing purpose or knowledge, since most of them  
21 apparently didn't affect her. She alleges the forms she was provided with are too  
22 complicated to understand. (¶ 27.) She also believes Defendants owed fiduciary duties to  
23 her. (¶ 29.)

24       As a result of the alleged misrepresentations and non-disclosures, Plaintiff believes  
25 no one owns the loan, and no one has the right to foreclose. (Complaint, ¶ 26.) She also  
26 alleges she has suffered financial harm, emotional distress, and medical expenses. (¶ 32.)

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1                   **A. RESPA Claims**

2                   As part of the RESPA claim section, the complaint alleges Defendants failed to  
3 respond to certain unspecified qualified written requests, and imposed a late fee without  
4 giving notice of loan transfer. This section also alleges generalized wrongdoing.

5                   **B. TILA Claims**

6                   This section begins with a tacit acknowledgment that the limitations period has run,  
7 but argues that because “[a]ll Defendants . . . fraudulently concealed facts upon which the  
8 existence of Plaintiff[s] claims is based,” she is entitled to equitable tolling.

9                   The only actual TILA claims are set forth in paragraph 46, and allege the interest rate  
10 was deceptively presented, the APR was not correctly calculated, and the required payments  
11 were not fully disclosed. In Plaintiff’s opinion, this “rendered the credit transaction null and  
12 void [and] invalidates Defendants’ claimed interest” in the property. (¶ 47.)

13                   **C. Section 17200 Claim**

14                   This claim is generally based on allegations already made. This section of the  
15 complaint alleges generally unfair lending, charging unlawful commissions and fees, and  
16 deceit.

17                   **D. Negligent Misrepresentation Claims**

18                   This claim is pleaded in three parts, or “counts,” against different Defendants. It  
19 reiterates earlier allegations of misrepresentations, and also alleges Saxon misrepresented  
20 that it had the right to foreclose on the loan. Plaintiff alleges monetary loss, medical  
21 expenses, and emotional distress.

22                   **E. Fraud**

23                   This claim is also pleaded in three “counts,” against different Defendants (including  
24 an unnamed broker). Each count alleges misrepresentations generally, and argues Plaintiff  
25 suffered harm because she relied on these. The allegations refer to “promises and  
26 representations” (¶ 72) referring, apparently, to representations alleged earlier in the  
27 complaint. The only additional allegations of false promises or representations are an  
28 allegation that the loan yield was insufficient to pay off some of Plaintiff’s debts (¶ 71), of

1 "secret intentions not to perform," (¶¶ 72, 74), and of Saxon's misrepresentation that it had  
 2 the right to foreclose. (¶ 81.) Plaintiff alleged she relied on Defendants' representations to  
 3 her, and as a result she suffered monetary harm, medical expenses, and emotional distress.  
 4 This section also contains allegations that Defendants were reputable, and thus Plaintiff was  
 5 justified in relying on what they told her. (¶ 89.)

6 **II. Motion to Expunge Notice of *Lis Pendens***

7 Although a notice of *lis pendens* is a creature of California state law, under 15 U.S.C.  
 8 § 1964 state law *lis pendens* provisions apply in federal court. *Ramirez v. SCME Mortg.*  
 9 *Bankers, Inc.*, 2010 WL 2839476, at \*5 (S.D.Cal., July 19, 2010). Defendant Saxon asks  
 10 the Court, pursuant to Cal. Civ. Proc. Code §§ 405.31, 405.32, and 405.34, to expunge the  
 11 notice Plaintiff recorded on August 11, 2009. The motion is supported by a request for  
 12 judicial notice of certain loan-related documents.

13 Under California law, a notice of *lis pendens* should be expunged if a plaintiff cannot  
 14 establish his complaint contains a real property claim. *Kirkeby v. Superior Court*, 33 Cal.4th  
 15 642, 647 (2004). "Unlike most other motions, . . . the burden is on the party opposing the  
 16 motion [to expunge] to show the existence of a real property claim. *Id.* (citing Cal. Civ. Proc.  
 17 Code § 405.30). In his opposition to the motion, Plaintiff argues she can establish this.

18 At the pleading stage, the Court undertakes a limited demurrer-like analysis focusing  
 19 on whether a viable property claim has been pleaded. *Id.* at 647–48. For this purpose, a  
 20 real property claim is a cause of action "which would, if meritorious, affect . . . title to, or the  
 21 right to possession of, specific real property . . ." Cal. Civ. Proc. Code § 405.4. The effect  
 22 is that the party recording the notice must make a showing that he is likely to prevail on the  
 23 merits. *Amalgamated Bank v. Superior Court*, 149 Cal. App. 4th 1003, 1011 (Cal. App. 3  
 24 Dist. 2007).

25 Neither the complaint nor Plaintiff's opposition to the motion to expunge differentiate  
 26 between property claims for *lis pendens* purposes, and other claims. Here, the only possible  
 27 property claims are those that seek rescission, seek to prevent the foreclosure sale, seek  
 28 to quiet title, or otherwise challenge the validity of Defendants' security interest in the

1 property. Plaintiff's claims for monetary damages are not property claims within the meaning  
 2 of these statutes. The Court rejects Plaintiff's unsupported suggestions that any irregularity  
 3 in the loan process would entitle her to prevail in a quiet title action.

4 Saxon requests \$2,350 in attorney's fees, which Cal. Civ. Proc. Code § 405.38 says  
 5 should be awarded unless the Court finds Plaintiff acted with substantial justification or that  
 6 the imposition of fees and costs would be unjust.

7 **A. Statute of Limitations**

8 The loan agreement was entered into on or around October 12, 2004, and Plaintiff  
 9 didn't file this action until August 10, 2009, nearly five years later. Saxon therefore argues  
 10 that both the TILA and RESPA claims are time-barred. Under 28 U.S.C. § 1635(f),  
 11 rescission as a remedy under TILA becomes unavailable three years after consummation  
 12 of the loan, when the consumer transfers all her interest in the property, or when the property  
 13 is sold, whichever occurs first. *Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 900 (9th Cir.  
 14 2003) (citing 12 C.F.R. § 226.23(a)(3)). Equitable tolling is inapplicable; § 1635(f) completely  
 15 extinguishes the right of rescission at the end of the 3-year period. *McCann v. Quality Loan*  
 16 *Serv. Corp.*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 3118313, at \*4 (W.D. Wash., July 21, 2010)  
 17 (citing *Beach v. Ocwen Fed'l Bank*, 523 U.S. 410, 412 (1998)).

18 In her opposition, Plaintiff hasn't attempted to explain why her TILA claim isn't time-  
 19 barred. She did request expedited discovery and briefing but didn't explain how either would  
 20 help her show her claims weren't time-barred.

21 Saxon argues RESPA is subject to two statutes of limitations, as provided under 12  
 22 U.S.C. § 2614:<sup>2</sup> a one-year limitations period for violation of §§ 2607 and 2608, and a three-  
 23 year limitations period for violations of § 2605. But these are beside the point here. Plaintiff  
 24 has raised a RESPA claim only under § 2605, and rescission is unavailable under this  
 25 section. *Permpoon v. Wells Fargo Bank N.A.*, 2009 WL 3214321, at \*11 (S.D.Cal., Sept. 29,  
 26 ///

27  
 28 <sup>2</sup> Saxon actually cites 26 U.S.C. § 2614 in both its motion to expunge and its motion to dismiss, but this must be a scribal error.

1 2009). The RESPA claim therefore doesn't affect an interest in property and can't form the  
 2 basis for a notice of *lis pendens*.

3       **B. Failure to Tender**

4       In *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1171 (9th Cir. 2003), the Ninth Circuit  
 5 held that district courts have discretion to condition rescission on tender of the loan  
 6 proceeds. Relying on this and other precedents, courts in this circuit have required plaintiffs  
 7 seeking to challenge a pending foreclosure sale to first allege tender of the amount of the  
 8 secured indebtedness. *Grant v. Aurora Loan Servs., Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL  
 9 3517399, at \*7 (C.D.Cal., Sept. 10, 2010) (citing cases). In other words, a plaintiff must  
 10 plead that she has paid amount of indebtedness or at least is prepared to pay it if rescission  
 11 is granted. *Id.* at \*8 (holding challenge to foreclosure sale barred by tender rule, where  
 12 plaintiff could at most offer to enter into a short sale agreement with defendant).

13       The "tender rule," as it is sometimes called, is designed to prevent courts from  
 14 granting rescission only to find out a plaintiff's inability to tender the loan proceeds rendered  
 15 the award meaningless. *Garza v. American Home Mortg.*, 2009 WL 188604, at \*5 (E.D.Cal.,  
 16 Jan. 27, 2009). While several courts have held application of this rule is discretionary, see,  
 17 e.g., *De Valle v. Mortg. Bank of Cal.*, 2010 WL 1813505, at \*9 (E.D.Cal., May 5, 2010), the  
 18 Court believes it should be applied here. The application of this rule is particularly  
 19 appropriate where, as here, a defendant has raised the issue, and where the pleadings  
 20 suggest the default is due to the plaintiff's inability to pay. (See Compl., ¶ 71 (alleging the  
 21 loan proceeds "did not pay off [unspecified debts] as Defendants promised [they] would  
 22 do").)

23       Saxon points out Plaintiff has not alleged tender of the loan proceeds, or the ability  
 24 to do so. In her opposition, Plaintiff has made no response other than the request for  
 25 additional briefing and discovery, as noted above. Neither discovery nor additional briefing  
 26 would make any difference here.

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1                   **C. Failure to Plead Fraud Adequately**

2                   Saxon argues the complaint has not adequately pleaded fraud as required under Fed.  
 3 R. Civ. P. 9(b), and the Court agrees. The complaint says the Defendants, along with an  
 4 unidentified broker, conspired together to make misrepresentations to Plaintiff and to induce  
 5 her to rely on them. It doesn't plead facts in chronological order, so it isn't completely clear  
 6 when the various alleged misrepresentations were made.<sup>3</sup> Paragraphs 15 through 17, 46,  
 7 and 67 through 74 make generalized references to misrepresentations concerning interest  
 8 rates, amount of payments, the amount of equity in the property, available loan proceeds,  
 9 and fees and other compensation to Defendants. These paragraphs do little more than  
 10 identify the subjects of the alleged misrepresentations, and recite the elements of a fraud  
 11 claim. This is insufficient even under the ordinarily pleading standard, *Ashcroft v. Iqbal*, 129  
 12 S.Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action,  
 13 supported by mere conclusory statements, do not suffice."), much less under the heightened  
 14 Rule 9(b) standard. Other paragraphs in the complaint refer to misrepresentations, but these  
 15 are alleged misrepresentations of the right to foreclose, and are unsupported by any  
 16 allegations showing why they would constitute fraud, or why they would support rescission  
 17 or a quiet title claim. (Compl. ¶¶ 26, 81.)

18                   In reply, Plaintiff merely points to the arguments set forth in her opposition to Saxon's  
 19 motion to dismiss. (P.'s Opp'n to Mot. to Expunge, 2:23–24.) This section asserts that  
 20 Plaintiff, by identifying the topics of the alleged misrepresentations, the entities involved, the  
 21 locations of the various parties, and the approximate time period, has adequately pleaded  
 22 facts. She argues she is not required to identify individual employees by name. The Court  
 23 disagrees. The complaint leaves out the main relevant details of what was allegedly  
 24 represented to Plaintiff, who made the representation, how it was represented, what the truth  
 25 was, and how it was concealed from Plaintiff. These are all things Plaintiff should be able  
 26 to allege clearly and in some detail. Plaintiff never says what anybody told her about the  
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28                   <sup>3</sup> The time frame is important here, because it is obvious some alleged misrepresentations occurred after the loan was entered into, and wouldn't warrant rescission.

1 interest rate, the loan proceeds, the fees, or any other charges; whether the  
 2 misrepresentations were express or implied; whether the misrepresentations were spoken  
 3 to her, communicated in writing, or conveyed in some other way; when and under what  
 4 circumstances each of the allegedly fraudulent communications were made to her; how it  
 5 was that Defendants prevented her from discovering the truth; or what the actual interest  
 6 rate or amounts of money were. These are the types of things a defrauded plaintiff would  
 7 be expected to know, or at least be able to find out readily. Without these details, it would  
 8 be difficult or impossible for Defendants to know what communications of theirs Plaintiff was  
 9 referring to, what she thinks they said, why they were material, and why it might constitute  
 10 fraud.

11 The allegations are also unacceptable because they are almost entirely conclusory,  
 12 and the conclusions are unsupported by factual context. Even under the general pleading  
 13 standard this is insufficient, *Iqbal*, 129 S.Ct. at 1954 (explaining that courts are not required  
 14 “to credit a complaint’s conclusory statements without reference to its factual context”), and  
 15 it is particularly so under the heightened Rule 9(b) standard. It is not for Plaintiff to conclude  
 16 that misrepresentations about interest rates, fees, loan proceeds, or the like were material  
 17 without providing any figures at all. It is not for Plaintiff to conclude she was induced to  
 18 believe misrepresentations with no explanation of any kind of how the communications were  
 19 made or how it was she was deceived. By way of example, the first page of the deed of trust  
 20 signed by Plaintiff says the loan proceeds were \$262,500.<sup>4</sup> It is therefore wholly unclear how  
 21 it is she was deceived into thinking the proceeds would be some other amount.

22 Although the motion to expunge directly challenged the adequacy of Plaintiff’s fraud  
 23 allegations, she didn’t attempt to show she could plead details with any greater particularity.  
 24 It may be that Plaintiff can ultimately save this claim by amending to plead more specifically.  
 25 But in opposing a motion to expunge a notice of *lis pendens*, the plaintiff bears the burden

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 27 <sup>4</sup> This document is attached as Exhibit 1 to Saxon’s Request for Judicial Notice in  
 28 Support of its Motion to Dismiss. While Plaintiff doesn’t oppose the request, the Court need  
 not take notice of the deed of trust at this time, but merely cites it for purposes of using its  
 language as an example of the types of matters the complaint’s allegations should have  
 addressed.

1 of showing the existence of a valid real property claim. *Kirkeby*, 33 Cal.4th at 647. Allowing  
2 a notice of *lis pendens* to remain on record after a plaintiff has failed to meet her burden,  
3 merely because she might be able to succeed in the end, would encourage sandbagging by  
4 plaintiffs. See, e.g., *California-Hawaii Development, Inc. v. Superior Court*, 102 Cal. App.  
5 3d 293, 300 (Cal. App. 1 Dist. 1980) (noting incentive of party filing notice of *lis pendens* to  
6 cause delay, particularly if that party's arguments were non-meritorious); *Amalgamated  
7 Bank*, 149 Cal. App. 4th at 1012 and n.14 (outlining history of legislative reform of *lis  
8 pendens* and policy reasons for making them easier to expunge).

9 **D. Other Arguments**

10 While Saxon has raised other arguments, the Court need not consider these  
11 arguments when ruling on this motion because it is clear the notice must be expunged.  
12 Saxon also raised these arguments in its motion to dismiss and they will be considered for  
13 that purpose. Judicial notice of the loan-related documents is also unnecessary in deciding  
14 this motion.

15 While the Court may order discovery for any party affected by a motion to expunge  
16 or may hold an evidentiary hearing, Cal. Civ. Proc. Code § 405.30, Plaintiff has not explained  
17 why either would be appropriate here. The Court's decision on this motion is based on the  
18 motion and opposition.

19 **E. Attorney's Fees**

20 Except for the TILA and fraud claims, Plaintiff has not adequately shown that any of  
21 her claims, if meritorious, might affect the title to or right to possession of real property. In  
22 response to Saxon's motion to expunge, Plaintiff failed to show any reason why the TILA  
23 claim is not time-barred, or why she had adequately pleaded (or could adequately plead)  
24 fraud. Except for her arguments that her claims were valid, Plaintiff didn't directly address  
25 the request for attorney's fees.

26 While it is clear Plaintiff's TILA claim for rescission was brought without substantial  
27 justification, it is unclear at this point what Plaintiff is alleging with regard to fraud, and  
28 whether she will ultimately be able to save her claim by amendment. Attorney's fees will

1 therefore be denied at this time, but Saxon may renew its request if Plaintiff's fraud claim is  
 2 ultimately dismissed.

3 **III. Motions to Dismiss**

4 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v.*  
 5 *Block*, 250 F.3d 729, 732 (9th Cir.2001). In ruling on a motion to dismiss, the Court accepts  
 6 all allegations of material fact in the complaint as true and construes them in the light most  
 7 favorable to the non-moving party. *Cedars-Sinai Medical Center v. National League of*  
 8 *Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007). While the scope of review on a  
 9 motion to dismiss for failure to state a claim is ordinarily limited to the contents of the  
 10 complaint as well as any "documents whose contents are alleged in a complaint and whose  
 11 authenticity no party questions, but which are not physically attached to the pleading, may  
 12 be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d  
 13 449, 454 (9th Cir.1994) *overruled on other grounds by Galbraith v. County of Santa Clara*,  
 14 307 F.3d 1119 (9th Cir. 2002). The court may treat such a document as "part of the  
 15 complaint, and thus may assume that its contents are true for purposes of a motion to  
 16 dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

17 Both sides cite *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) as setting forth the  
 18 standard for dismissal under Fed. R. Civ. P. 12(b)(6). Under *Conley*, dismissal was  
 19 appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts  
 20 in support of his claim which would entitle him to relief." But *Conley*'s holding is no longer  
 21 good law, having been expressly rejected by the Supreme Court in *Bell Atlantic v. Twombly*,  
 22 550 U.S. 544, 560–63 (2007). Under *Twombly*, a complaint must "give the defendant fair  
 23 notice of what the . . . claim is and the grounds upon which it rests" and its factual allegations  
 24 must "raise the right to relief above a speculative level." *Id.* at 555.

25 **A. Saxon's Motion to Dismiss**

26 Saxon raises most of the same arguments in its motion to dismiss as in its motion to  
 27 expunge. The motion to dismiss includes factual representations, supported by documents  
 28 Saxon asks the Court to notice. Saxon represents that it was not the original loan servicer

1 and points out Plaintiff has admitted this. Saxon therefore argues that the claims do not  
 2 apply to it. Saxon also represents that WMC was the original lender but that Deutsche Bank,  
 3 which is not a named Defendant, is the current beneficiary under the deed of trust.

4 **1. Statutes of Limitations**

5 Saxon raises the same statutes of limitations defenses as in its motion to expunge.  
 6 As discussed above, Plaintiff's TILA claim for rescission is time-barred. Her other TILA  
 7 claims, for money damages, are subject to a 1-year statute of limitations, 15 U.S.C.  
 8 §1640(e), and her RESPA § 2605 claims are subject to a 3-year statute of limitations from  
 9 the date the alleged violation occurred. 12 U.S.C. § 2614.

10 TILA's one-year limitations period has run unless tolling applies. Plaintiff argues  
 11 TILA's one-year limitations period for damages may be equitably tolled, *Pelayo v. Home*  
 12 *Capital Funding*, 2009 WL 1459419, at \*5 (S.D.Cal., May 22, 2009), and says it should be  
 13 tolled here because Defendants prevented her from discovering her cause of action. She  
 14 alleges Defendants "delivered multiple disclosures to Plaintiff which were misleading,  
 15 deceptive, inconsistent, incorrect, and not reasonably comprehensible by a consumer."  
 16 (Opp'n to Saxon's Mot. to Dismiss, 8:7–8.) These generalized allegations are insufficient to  
 17 show that tolling applies, but by the same token it is not absolutely certain at this point  
 18 Plaintiff could not qualify for tolling.

19 Saxon argues Plaintiff has conceded her claim was filed beyond the three-year  
 20 RESPA limitations period. Plaintiff disagrees, pointing out she served a qualified written  
 21 request on March 4, 2009 and again on July 27, 2009. She attaches exhibits showing these  
 22 requests were sent to Saxon. This is sufficient to withstand the statute of limitations defense  
 23 for these two claims. But the specifics of these two requests must be mentioned in the  
 24 complaint itself, so Plaintiff will be required to amend her complaint to include this  
 25 information.

26 **4. RESPA Liability for Assignees**

27 Saxon cites *In re Murray*, 239 B.R. 728, 736 (Bkrtcy. E.D.Pa. 1999) for the principle  
 28 that RESPA does not cover assignees. *Murray* does not stand for such a broad proposition,

1 however, holding instead that RESPA's definition of "lender" does not include a subsequent  
 2 assignee not named in the document creating the loan. *Id.* But other portions of RESPA  
 3 apply to non-lenders, including § 2605(e), which requires servicers to respond to qualified  
 4 written requests from borrowers or their agents. Sections (a) through (e) of this same section  
 5 contemplates transference of loan servicing. See also § 2605(i)(2) (defining "servicer").

6 **3. Damages in Tort**

7 Saxon next cites *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988), for the  
 8 principle that, because Plaintiff's relationships and interactions with Defendants are  
 9 fundamentally contractual, tort damages (e.g., for emotional distress) are unavailable.  
 10 Plaintiff does not address this argument, so the Court takes this point as conceded.

11 **4. Holder in Due Course**

12 Saxon raises the defense that it is a holder in due course, and therefore under Cal.  
 13 U.C.C. § 3305 Deutsche Bank took the loan free and clear of defenses and claims by  
 14 Plaintiff. This defense is, however, fact-based, requiring a finding that Deutsche Bank took  
 15 the loan for value, in good faith, and without notice of any defense or claim. Cal. U.C.C.  
 16 § 3302. The documents Saxon asks the Court to take notice of would not suffice to establish  
 17 this defense. Because the Court does not consider facts outside the pleadings at this stage,  
 18 this defense cannot support dismissal of any claims.

19 **5. Tender Rule**

20 Saxon again raises the tender rule as a defense to claims for rescission and to quiet  
 21 title, and Plaintiff again argues tender is not required. For reasons set forth in the Court's  
 22 analysis above, all claims attempting to challenge the threatened foreclosure sale will be  
 23 dismissed unless Plaintiff can in good faith allege willingness and ability to tender the loan  
 24 proceeds. Should she so allege, evidence of her willingness and ability may later be  
 25 required.

26 **6. Failure to Allege Fraud with Particularity**

27 Saxon raises the same arguments against Plaintiff's fraud claims as it raised in its  
 28 motion to expunge, and Plaintiff's response is obviously the same as well. For reasons set

1 forth above, the Court finds Plaintiff has not adequately pleaded fraud, though it is unclear  
 2 whether she could amend her complaint to cure this defect.

3                   **7. Request for Judicial Notice**

4                   Because the Court need not at this time judicially notice the documents submitted in  
 5 support of Saxon's motion to dismiss, the request for judicial notice is moot.

6                   **B. Saxon's Alternative Request to Strike**

7                   In the alternative, Saxon as part of this same motion has asked the Court to strike  
 8 Plaintiff's request for punitive damages. Because Plaintiff will be given an opportunity to  
 9 amend her complaint, the Court assumes she will consider these arguments and plead  
 10 accordingly. For now, this request will be denied as unripe.

11                   **C. WMC's Motion to Dismiss**

12                   WMC raises many of the same arguments as Saxon has raised, though some  
 13 arguments are unique to WMC's motion. For most of the arguments also raised by Saxon,  
 14 the analysis is obviously the same.

15                   **1. Inadequacy of Allegations**

16                   In addition to pointing out the generalized nature of the fraud allegations, WMC notes  
 17 that an unidentified broker is identified as a participant. WMC contends that an independent  
 18 mortgage broker is a borrower's agent, citing *Wyatt v. Union Mortg. Co.* 24 Cal.3d 773, 782  
 19 (1979), and that WMC is therefore not liable for any misstatements by the broker. While the  
 20 complaint alleges the broker and all Defendants acted as each other's agents, agency is a  
 21 legal conclusion. The only allegations supporting this conclusion are that all Defendants  
 22 conspired together and worked in concert. As factual allegations, these are deficient. Cf.  
 23 *Iqbal*, 129 S.Ct. at 1950 (analyzing allegations of conspiracy and parallel conduct as set forth  
 24 in *Twombly*, and concluding that generalized allegations did not "nudge" the plaintiff's claims  
 25 "across the line from conceivable to plausible") (citing *Twombly*, 550 U.S. at 551, 555,  
 26 565–56, 567, 570).

27                   The Court agrees that Plaintiff must plead facts to show whose agent the broker was,  
 28 and who misled or made misrepresentations to Plaintiff. At present, the complaint leaves

1 open the possibility that someone other than Defendants was responsible for most of the  
 2 harm to Plaintiff. In other words, most of the complaint amounts to little more than claims  
 3 that Defendants might or might not be liable to her. Plaintiff knows, or should know, whom  
 4 she talked with and met with, and who sent letters or other papers to her. She has made a  
 5 general request for early discovery, but has not explained what she is seeking or why she  
 6 needs it in order to plead her claims adequately.

7 **2. RESPA Claims**

8 As discussed above, the only claims Plaintiff has pleaded with any particularity, or  
 9 shown she could so plead, are RESPA claims for failure to respond to qualified written  
 10 requests. WMC argues that, as the original lender, it is not responsible for replying to  
 11 qualified written requests. In her opposition, Plaintiff argues WMC may in fact have been  
 12 the servicer. The problem with this argument is that Plaintiff has never alleged sending  
 13 WMC any qualified written requests, much less any details about these requests. See  
 14 *Delino v. Platinum Cnty. Bank*, 628 F. Supp. 2d 1226, 1231–32 (S.D.Cal. 2009) (concluding  
 15 plaintiff failed to state a claim under RESPA, where she failed to allege to whom specifically  
 16 plaintiff made QWRs, when plaintiff made such requests, how defendants failed to respond  
 17 to such requests, if the 60-day statutory period for response had lapsed, and how defendant  
 18 met the statutory definition of a "servicer"). The qualified written requests Plaintiff has  
 19 submitted are all addressed to Saxon. Plaintiff alleges the complaint itself serves as an  
 20 additional qualified written request but, as noted, the purported qualified written request was  
 21 stricken from the complaint. And even assuming the complaint could contain an adequate  
 22 qualified written request,<sup>5</sup> Plaintiff obviously couldn't truthfully allege Defendants had failed

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24 <sup>5</sup> The Court rejected Plaintiff's argument that she could permissibly include a qualified  
 25 written request within the complaint, and that such a request would be adequate. RESPA  
 26 provides that a QWR consists of "a written correspondence" that satisfies certain conditions.  
 27 12 U.S.C. § 2605(e)(1)(B). Pleadings are not conversations between the parties; rather, they  
 28 are addressed to the Court. Plaintiffs in this District and elsewhere have attempted to  
 include requests in their complaints as a means of making QWRs, and all efforts have been  
 rejected. See, e.g., *Delino*, 628 F. Supp. 2d 1226; *Wenglicki v. Tribeca Lending Corp.*, 2009  
 WL 1364430 WL 2195221 (E.D.Pa., July 22, 2009), *Walker v. Equity 1 Lenders Group*,  
 (S.D.Cal., May 14, 2009), *Andrew v. Ivanhoe Financial, Inc.*, 2008 WL 2265287 (E.D.Pa.,  
 May 30, 2008).

1 to make timely response to it. See *Rivas v. New Century Mortg. Corp.*, 2010 WL 330225,  
 2 at \*3 (S.D.Cal., Jan. 20, 2010) (“[E]ven if a complaint can constitute a qualified written  
 3 request, Plaintiff cannot plausibly allege that [a defendant] failed to respond to her qualified  
 4 written request in the same document that contains the alleged qualified written request.”)

5 Plaintiff has therefore failed to adequately plead any RESPA claims against WMC.

6 **3. Cal. Bus. & Prof. Code § 17200 Claim**

7 This statute “borrows’ violations of other laws and treats them as unlawful practices,”  
 8 making them independently actionable. *Cel-Tech Communications, Inc. v. Los Angeles*  
 9 *Cellular Tel. Co.*, 20 Cal.4th 163,180 (1999). It covers “anything that can properly be called  
 10 a business practice and that at the same time is forbidden by law.” *Id.* (quoting *Rubin v.*  
 11 *Green*, 4 Cal.4th 1187, 1200 (1993)) (further citations omitted). In some cases, this requires  
 12 a showing that a defendant has violated some statutory, regulatory, or constitutional  
 13 requirement. But there is some authority for the proposition that more general unfairness  
 14 may satisfy this requirement in consumer actions, see *Kilgore v. KeyBank*, \_\_\_\_ F. Supp. 2d  
 15 \_\_\_, 2010 WL 1461577, at \*8 (N.D.Cal., Apr. 12, 2010), though it is unclear whether this  
 16 would qualify as a consumer action.

17 In any case, a § 17200 claim rises or falls with the underlying claims of wrongdoing.  
 18 Because Plaintiff has not sufficiently alleged wrongdoing by Defendants, this claim must be  
 19 dismissed as well.

20 **4. Negligent Misrepresentation**

21 WMC characterizes the negligent misrepresentation claim as being based on a  
 22 fiduciary duty. Citing *Nymark v. Heart Fed'l Savings & Loan Ass'n*, 231 Cal. App. 3d 1089,  
 23 1095–96 (Cal. App. 3 Dist. 1991), argues that as a lender it owed Plaintiff no fiduciary duties.  
 24 Plaintiff’s opposition doesn’t address this argument, but instead focuses on the adequacy  
 25 of the pleading. As discussed, none of the claims for misrepresentation or fraud are specific  
 26 or clear enough to withstand a motion to dismiss.

27 / / /

28 / / /

## 5. Quasi-Contract

2        Although the complaint says the quasi-contract claim is brought against all  
3 Defendants, WMC points out the allegations actually only attempt to bring claims against  
4 Saxon. In her opposition, Plaintiff recharacterizes this as an unjust enrichment claim. Unjust  
5 enrichment, however, is a principle of restitution underlying other claims, not a separate  
6 cause of action. *Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (Cal. App. 2 Dist.  
7 2008). In other words, Plaintiff appears to be arguing that Defendants were required to  
8 make restitution to her, and failed to do so. This claim is therefore derivative of other claims.  
9 Because they are inadequately pleaded, so is this claim.

## 6. Tender Rule

11 In arguing for dismissal of Plaintiff's claim for determination of the validity of the lien,  
12 WMC raises the tender rule, and the analysis is essentially the same.

#### **D. Plaintiff's Request for Judicial Notice**

14 In her opposition, Plaintiff has asked the Court to take judicial notice of two  
15 documents, a statement of charges against WMC issued by the State of Washington  
16 Department of Financial Institutions Division of Consumer Affairs, and a calendar for the  
17 month of October, 2004. The request for judicial notice doesn't explain why Plaintiff believes  
18 the Court can and should take notice of them.

19 The Court can take notice of facts not subject to reasonable disputes, such as dates,  
20 if necessary, but it is unclear why the Court should take notice of dates in the month of  
21 October, 2004. Plaintiff has not shown why the statement of charges would be relevant.

#### IV. Conclusion and Order

## A. Notice of *Lis Pendens*

24 Plaintiff's claim for rescission under TILA is apparently time-barred. Her claim for  
25 fraud is inadequately pleaded and she has not shown that she could amend it if given the  
26 opportunity. It does not appear any other claim or theory of recovery in the complaint would  
27 constitute a property claim. Plaintiff has therefore not met her burden of showing the  
28 existence of any real property claims. It is **ORDERED** that Plaintiff's Notice of Pendency of

1 Action, recorded as Document No. 2009-0448882, on August 11, 2009, in the San Diego  
2 County Recorder's Office, against the real property located at 440 Kingwood Drive, San  
3 Diego, California 92114 is **EXPUNGED**. The request for attorney's fees is **DENIED**  
4 **WITHOUT PREJUDICE**.

5 **B. Motions to Dismiss**

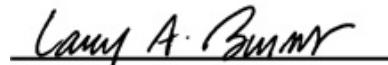
6 The complaint fails to state a claim. The request for rescission under TILA is  
7 **DISMISSED WITHOUT LEAVE TO AMEND**, because her right to rescind under this statute  
8 is time-barred and tolling does not apply. In other respects, the complaint is **DISMISSED**  
9 **WITHOUT PREJUDICE**. If Plaintiff wishes to file an amended complaint to remedy the  
10 defects identified in this order, she may do so no later than **28 calendar days from the date**  
11 **this order is issued**. If Plaintiff includes claims identified in this order as apparently time-  
12 barred, she must plead facts to show why tolling applies. If she seeks to challenge the  
13 pending foreclosure sale, or to quiet title, or if she seeks rescission under any theory other  
14 than TILA, she must comply with the tender rule by pleading either that she has made tender  
15 or is prepared to make tender should the relief she seeks be granted.

16 The request to strike is **DENIED** as unripe. All requests for judicial notice are  
17 **DENIED**, and requests for a more definite statement are **DENIED** as moot.

18

19 **IT IS SO ORDERED.**

20 DATED: September 29, 2010

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22 **HONORABLE LARRY ALAN BURNS**  
23 United States District Judge

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